

June 9, 2009

Malinda Miller
624 South Street
P.O. Box 44
Townsend, DE 19734

**RE: Freedom of Information Act ("FOIA") Complaint
Against Townsend, Delaware**

Dear Ms. Miller:

On May 15, 2009, I received your undated letter complaining that the Town of Townsend ("Town") had denied your April 23, 2009 FOIA request for a copy of a letter to the Mayor complaining about your family's use of a vacant lot behind your house. The Town had denied your request on the grounds that the document is part of a law enforcement investigatory file, exempted from FOIA pursuant to 29 *Del. C.* § 10002(g)(3). On May 29, 2009, we received the Town's response to your complaint. We asked the Town for additional information, which we received on June 3, 2009. This is the Attorney General's determination of your complaint, pursuant to 29 *Del. C.* § 10005(e).

FACTS

According to the Town, in response to a recent verbal complaint about your family's use of the vacant lot, the Mayor advised the complainant that the Town would

not investigate without a written complaint. Shortly thereafter, the Town received the letter in contention here. According to the Town's notes of the April 22, 2009 Town Council meeting, Jay Miller, your husband, questioned during the public comment portion of the meeting whether the Town could "post" the vacant lot. The Mayor responded by mentioning the letter complaining about Miller's behavior when using the lot and by referring to some of the activities Miller allegedly engaged in on the lot. You contend that you are entitled to a copy of the letter because the Mayor offered to give it to you, and that the Town cannot claim the exemption for investigatory files because you do not believe there is an investigation.

RELEVANT STATUTES

29 *Del. C.* § 10003 requires that public records be available to the public for inspection and copying. 29 *Del. C.* § 10002(g)(3) excludes "[i]nvestigatory files compiled for civil or criminal law-enforcement purposes" from the definition of a public record.

DISCUSSION

A public body that enforces the law has the right pursuant to 29 *Del.C.* § 10002(g)(3) to withhold from the public letters of complaint about violations of the law. *News-Journal Co. v. Billingsley*, 1980 WL 3043, at *3 (Del. Ch. Nov. 20, 1980). This protection is necessary to avoid "a chilling effect on those who might bring pertinent information to the attention of" law enforcement. *Id.* This chilling effect would occur whether the public body chose to investigate the complaint or to ignore it.

The Town of Townsend is charged in its Charter to protect the public from the conduct the letter complains of, and Town ordinances prohibit such conduct. In

order to avoid further public dissemination, I will not cite the specific sections that your family allegedly violated. When the Town receives a complaint alleging conduct that would violate an ordinance, it is entitled to protect the complainant by keeping its file confidential. Because of the public interest in preserving the confidentiality of law enforcement files, and because I find that the letter cannot be redacted to prevent disclosure of the identity of the person who wrote it, the entire letter may remain confidential.

You contend that because the Mayor said he would give you the letter, it must be disclosed to you. The same argument was made in *Hertzberg v. Veneman*, 273 F.Supp.2d 67, 82 (D.D.C. 2003), where the defendant agency repeatedly assured the plaintiff that requested documents would be disclosed, and then refused to release them, asserting various privileges. The court considered whether the defendant should be permitted to assert its position, applying the doctrine of estoppel, which requires the plaintiff to show, among other things, that he or she detrimentally relied on the defendant's conduct. *Id.* at 83; *Burge v. Fidelity Bond and Mortgage Co.*, 648 A.2d 414, 420 (Del. 1994). In *Hertzberg* the court found no reliance and therefore no estoppel. We find that even if the Mayor promised at the April 22, 2009 meeting to give you the letter, you did not rely on his promise, because the very next day you made a FOIA request for the letter. Thus, you have not demonstrated that the Town should be estopped to deny your FOIA request.

Although the Mayor publicly related some of the letter's contents, the letter itself has not thereby become part of the public domain. *Public Citizen v. Dep't of State*, 11 F.3d 198, 201 (D.C. Cir. 1993) held that although an agency can waive a FOIA

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exemption by publicly releasing information, congressional testimony that “revealed certain facts contained in the disputed documents” did not constitute a FOIA waiver because of the government’s strong interest in protecting national security. Similarly, here, the Mayor, by revealing only a small part of an extensive complaint, did not put the letter in the public domain. Moreover, the Town has a strong interest in protecting those who bring to its attention possible violations of the Town’s laws.

CONCLUSION

For the reasons stated herein, the Town of Townsend did not violate the Freedom of Information Act when it withheld from public disclosure a letter of complaint alleging possible violations of the Town Code.

Sincerely,

Judy Oken Hodas
Deputy Attorney General

Approved:

Lawrence W. Lewis
State Solicitor

cc: Sarah Murray, Opinion Coordinator
Frederick A. Townsend, III, Esquire